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In The Supreme Court of The United States

October Term 1973

No. 73-272

CLARENCE REYNOLDS, *et al.*,

Petitioner,

v.

THE CITY OF SACRAMENTO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT CITY OF SACRAMENTO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EVELLE J. YOUNGER, Attorney General
JACK R. WINKLER, Chief Assistant Attorney General
A. WELLS PETERSEN, Deputy Attorney General
DANIEL J. KREMER, Deputy Attorney General

1350 Front Street, Room 5006
San Diego, California 92101
Telephone: (714) 236-7764

Attorneys for Respondent

Interim Printing & Mailing Company, 3191 Adams Avenue, San Diego, California 92116 -- 283-7282

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OPINIONS BELOW

On May 1, 1973, the Supreme Court of the State of California upheld the constitutionality of the Sacramento City Code Sections herein involved in an opinion reported as *Crownover v. Musick* (1973) 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497. A May 13, 1971 opinion by the Court of Appeal of the State of California for the Third Appellate District, which opinion was vacated by the California Supreme Court's grant of hearing, is reported as *Glancy v. County of Sacramento* (1971) 94 Cal.Rptr. 864.

JURISDICTION

Petitioners assert jurisdiction under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Whether repeal of the challenged Sacramento City Code Sections renders the instant case moot;

Whether Sacramento City Code Sections regulating nude and semi-nude conduct violate the First Amendment;

Whether the Code sections' exception of theaters from their purview violates petitioners' right to equal protection of the laws;

Whether the definition of theater contained within the challenged city code sections is unconstitutionally vague.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Penal Code Sections 318.5 and 318.6, Sacramento City Code Sections 26.59 through 26.64 and Sacramento City Ordinance 3331, Fourth Series; are set out in the Appendix.

STATEMENT OF THE CASE

On November 19, 1969, petitioners filed a complaint in the Sacramento County Superior Court naming the City of Sacramento and three Does as defendants (CT 1).[1/] Therein, petitioners alleged that enforcement of recently enacted Sacramento

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[1/] CT refers to the Clerk's Transcript on appeal to the Court of Appeal of the State of California, Third Appellate District in case No. 3 Civil 12529. We assume petitioners have provided the Court with this transcript. If not, and the Court so desires, we will furnish it on request.

City Code sections 26.59 to 26.64 threatened to deprive them of due process, equal protection and the right to free expression in that enforcement of said sections would prevent their carrying on nude dancing and topless food and beverage service. Petitioners prayed for declaratory relief as well as permanent and temporary injunctive relief (CT 1-8).

By answer filed December 1, 1969, respondent denied all allegations of the complaint save that the City of Sacramento is a duly organized municipal corporation and that the ordinance in question was passed on November 17, 1969, as an emergency measure (CT 47-49).

On November 19, 1969, the Honorable William M. Gallagher, Judge of the Superior Court, issued a temporary restraining order enjoining enforcement of the code sections and an order to show cause pending issuance of a preliminary injunction (CT 9-10).

The matter was continued to November 26, 1969 (CT 16) when it was argued and submitted (CT 46).

On December 26, 1969, the Superior Court filed its ruling denying a preliminary injunction and dissolving the previously granted temporary restraining order (CT 50-54).

Notice of appeal was filed December 3, 1969 (CT 55).

On May 13, 1971, the Court of Appeal of the State of California for the Third Appellate District filed its opinion reversing the Superior Court order; Mr. Justice Friedman dissenting. *Glancy v. County of Sacramento* (1971) 94 Cal.Rptr 864.

On August 13, 1971, the California Supreme Court granted respondent's petition for hearing.

On May 1, 1973, the Supreme Court of the State of California filed its opinion affirming the order of the Superior Court for Sacramento County denying petitioners' application for a preliminary injunction to restrain enforcement of the city code sections (*Crownover v. Musick* (1973) 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497).

Petitioners' application for a rehearing and stay were denied

by the California Supreme Court on May 30, 1973. On August 9, 1973, the instant petition for writ of certiorari was filed.

On November 8, 1973, the Sacramento City Council enacted Ordinance 3331, Fourth Series, repealing the City Code Sections here under attack (Sacramento City Code Section 26.59 through 26.64). The Ordinance of repeal became effective December 8, 1973.

STATEMENT OF FACTS

No evidence was taken in the Superior Court of the State of California. All allegations of the complaint were denied save that the City of Sacramento is a duly organized municipal corporation and that the ordinance in question was passed on November 17, 1969, as an emergency measure (CT 1-8, 47-49).

Respondent filed an affidavit to the effect that petitioners' establishment operated under a type 40 alcoholic beverage license and that under the terms of such a license, persons under 21 years of age were not legally excluded from entering the licensed premises (CT 43-45).

SUMMARY OF ARGUMENT

The Sacramento City Council has repealed Sacramento City Code Sections 26.59 through 26.64. Since no actual case or controversy now exists, certiorari should be denied.

In any event the constitutionality of those sections presents no substantial federal question. For stated and valid reasons of public policy, the sections in question regulate nude and semi-nude conduct in public places, particularly establishments serving food or drink. The sections meet the criteria set by this Court for regulation of symbolic conduct and therefore do not infringe petitioners' First Amendment rights.

The sections' exception for theaters is neither vague nor does it deny petitioners their right to equal protection of the laws.

The classification scheme employed by the code sections prohibits only nude and semi-nude exhibitions occurring in precisely defined circumstances, where the attendant police problems are the most acute and the communicative element of the regulated conduct minimal.

ARGUMENT

I

THE LEGISLATION IN QUESTION HAVING BEEN REPEALED, THE MATTER IS MOOT

At issue in this case is the constitutionality of Sacramento City Code Sections 26.59 through 26.64 which regulate certain forms of nude and semi-nude entertainment and beverage service.

On November 8, 1973, the Sacramento City Council repealed those code sections and the order of repeal became effective December 8, 1973.

Since petitioners no longer face any possibility of prosecution under the repealed code sections, it follows that their request for a preliminary injunction and this application for certiorari have become moot. As this Court pointed out in *Baker v. Carr* (1962) 369 U.S. 186, 204:

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' "

See also Socialist Labor Party v. Gilligan (1972) 406 U.S. 583, 585-589.

While, for the foregoing reasons, respondent submits that the instant application for writ of certiorari is moot, respondent will in the sections following discuss the merits of petitioners' attack.

II

SACRAMENTO CITY CODE SECTIONS 26.59 THROUGH 26.64 REGULATE CONDUCT AND DO NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS

Petitioners, the owner and employees of a Sacramento beer bar known as the Fig Leaf mount an absolutist attack upon City Code sections 26.59 to 26.64 arguing that since dance is a protected form of expression, no variety of dance may be prohibited unless found obscene. It follows, according to petitioners, that the instant city code sections which allegedly prohibit nude and semi-nude dancing without such prerequisite finding are invalid. It is noteworthy that petitioners apparently have abandoned the contention advanced below that the art of the topless waitress is "entertainment" and entitled to a like measure of constitutional protection.

Petitioners betray a misreading of both the city code sections and the constitution. Sacramento City Code sections 26.59 to 26.64 do not prohibit any dance. Rather as the California Supreme Court found, for stated and valid reasons of public policy, those sections restrict nude and semi-nude activities in certain public places, particularly establishments serving food and drink, and relegate such conduct to the theater or concert stage. In short, the sections at hand regulate rather than prohibit the activities in which petitioners seek to engage. Accordingly, petitioners' reliance upon *Miller v. California* (1973) 413 U.S. 15, a case dealing with prohibition of obscenity, is misplaced.

In assessing the validity of these regulations, it is important to remember that petitioners' proposed activities are an amalgam of speech and non-speech elements—of dance, which California recognizes to be constitutionally protected (*In re Giannini* (1968) 69 Cal.2d 563, 570, 72 Cal.Rptr. 655, 446 P.2d 535) and total or partial nudity, which in itself is not so protected.

> "No one would suggest that the First Amendment permits nudity in public places . . . . " (*Roth v.*

United States (1957) 354 U.S. 476, 512, JJ. Douglas and Black dissenting.)

The instant code sections are aimed not at the expressive elements of petitioners' activities; but at the conduct of commercially exploiting nude and semi-nude females to the detriment of the public peace, morals and welfare.

The regulation of such conduct is well within governmental power. As the California Supreme Court pointed out in *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control Board* (1970) 2 Cal.3d 85 at page 106, 84 Cal.Rptr. 113, 465 P.2d 1, while the department might not be empowered to suspend the license of a topless establishment without an evidentiary showing of good cause, the department was empowered to "draw upon its expertise and the empirical data available to it and adopt regulations covering the situation." This is precisely what the Sacramento City Council has done.

That regulations restricting conduct may, under some circumstances, affect protected expression does not render those regulations invalid as an infringement of the First Amendment.

This Court so stated in *Konisgsberg v. State Bar* (1961) 366 U.S. 36 at pages 49-51:

> "At the outset we reject the view that freedom of speech and association [citation], as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. [Citations.] On the other hand,

> general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." [Footnotes omitted.]

In *United States v. O'Brien* (1968) 391 U.S. 367, a case upholding a law barring the destruction of a draft card against O'Brien's assertion that his burning the card was protected "symbolic speech" this Court stated the standards applicable to a weighing of the governmental interest:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*United States v. O'Brien, supra,* p. 377.)

The Sacramento code sections fulfill the *O'Brien* criteria. Initially, it is beyond question that the City was constitutionally and legislatively empowered to enact the ordinance (California Constitution, Art. XI, § 11; Penal Code §§ 318.5, 318.6). It is equally clear the governmental interest fostered is important and substantial. In City Code section 26.59, the Sacramento City Council found that:

> "[T]here exists in this city an increasing trend toward nude and semi-nude acts, exhibitions and entertainment and of undress by female employees of food, drink and like establishments serving

> the public and that such acts and such competitive commercial exploitation of nudity is adverse to the public peace, morals and good order; and that it is in the best interest of the public safety and convenience of this city to restrict such nudity, and the commercial promotion and exploitation thereof. . . ."

The City Council's statement reflects an interest not only in protecting the female employees but also an interest in preventing the disorders which may reasonably be expected to flow from a mixture of alcohol and female nudity in the close confines of a crowded beer bar or other establishment. The Council's fears are wholly reasonable. The courts having long recognized that "[V]ulgarity and violence . . . [have] a greater tendency to develop at a bar than at most other places" (*In re Kovalchuk* (1963) 202 Pa. Super. 389; 195 A.2d 828, 829).

In *City of Miami v. Jiminez* (1961) Fla.App., 130 So.2d 109, the court stated at page 110:

> "[T]his court will take judicial notice of the fact that the frequency of immoral acts in connection with the operation of drinking establishments is such that they often constitute a grave threat to the public welfare and municipal life."

In passing upon the validity of an ordinance forbidding female employees mingling with bar patrons, the court in *People v. King* (1952) 115 Cal.App.2d Supp. 875, 252 P.2d 78, stated at page 877:

> "The obvious purpose of the ordinance under consideration is to prevent female employees from improprieties and immoral acts likely to result from intimate familiarity of the sexes in liquor establishments. It is plain enough that drinking with patrons or dancing with patrons would tend to encourage improprieties . . . ."

Respondent submits that it is equally plain that nude acts

or exhibitions in close proximity to bar patrons and the circulation of semi-nude waitresses among those patrons would also tend to encourage immoral acts and improprieties and that the City's interest in preventing such situations is substantial.

The third *O'Brien* requirement is that the government interest be unrelated to the suppression of free expression. Certainly, the governmental interest in protecting female employees from exploitation and in preserving the public peace in and around public establishments is related to ends other than the suppression of free speech.

Finally, the Sacramento ordinance meets the *O'Brien* requirement that any incidental restriction upon First Amendment freedoms be the minimum necessary to the accomplishment of the governmental purpose. The fact that the legislation restricts only conduct and that its application excepts theaters insures that the sections' scope is no broader than the police problems anticipated and that an arena remains open to the performance of petitioners' acts and exhibitions.

In so weighing governmental concerns against freedom of expression it should not be forgotten that not all "speech" weighs equally in the scales. Thus, it has frequently been held that pure commercial or symbolic speech is entitled to a lesser degree of protection than speech conveying a political or religious message. For example, a home-owner's interest in uninterrupted peace may justify an ordinance forbidding door-to-door commercial solicitation (*Breard v. Alexandria* (1951) 341 U.S. 622), but not distribution of pamphlets advertising a religious meeting (*Martin v. Struthers* (1943) 319 U.S. 141). The California Supreme Court stated this distinction in *In re Porterfield* (1946) 28 Cal.2d 91 at page 101, 168 P.2d 706:

> "A municipality may impose reasonable conditions upon the conduct of a business. The right of free speech protected by the federal and state constitutional guaranties is not an absolute right which carries with it into businesses and professions total immunity from regulation in the performance of

> acts as to which speech is a mere incident or means of accomplishment. . . . The freedom of speech and of the press protected by the constitutional guaranties includes in the main, it has been said, freedom of expressions on political, sociological, religious, and economic subjects, not commercial activities to which speech is only an incident or means."

It is beyond question that the factors motivating petitioners' desire to present nude dancing are blatantly commercial rather than religious, political or sociological— petitioners' purpose is simply to sell more beer. It follows that the constitutional freedom to dance unencumbered by clothing asserted by petitioners is entitled to a minimum of weight.

In *City of Portland v. Derrington* (1969) 451 P.2d 111, 113; the Oregon Supreme Court considered an ordinance similar to that in this case. The court upheld the regulation stating:

> "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours.
>
> "Whether or not we agree with the wisdom of the city council's attempt to legislate morals, the question is not one of legislative wisdom, but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar

> has enough substance to present a First Amendment question."

Similarly, in *Hoffman v. Carson* 250 So.2d 891, appeal dismissed for lack of a federal question (1971) 404 U.S. 981, the Florida Supreme Court considered and found constitutionally valid the application of an indecent exposure statute to a nude dancer. The court stated at page 893:

> "Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression nor does it concern itself with obscenity. . . . Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [citations omitted], and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the Legislature."

Respondent submits the same result obtains here and that the opinion of the California Supreme Court raises no federal issue meriting review by this Court.

III

SACRAMENTO CITY CODE SECTIONS 26.59 THROUGH 26.64 DO NOT DENY PETITIONERS THE EQUAL PROTECTION OF THE LAWS

Petitioners next assert that the distinction between theaters and other public places embodied in the City Code sections deny them the equal protection of the laws.

As the California Supreme Court pointed out below, the code sections in question do not infringe upon rights of free expression (*Crownover v. Musick, supra*, p. 429-430). Accordingly, the appropriate equal protection test is whether the challenged code sections bear some rational relationship to a conceivable state purpose (*See Shapiro v. Thompson* (1969) 394 U.S. 618).

The Sacramento City Code sections in question plainly meet that test.

From the legislative findings contained in the code sections, it may be presumed that the City Council found that bars and cafes, as compared to theaters and concert halls, constitute a much greater problem for police control. It is well known that intoxicating beverages are much more likely to be freely consumed in a bar or cafe than in a theater or concert hall, and that therefore patrons of bars and cafes are less likely to exercise self-control over their personal conduct. It is similarly well known that in theaters and concert halls the stage or performing area is normally at some distance from and at some height above the spectators who are normally sitting in fixed seats. Under these circumstances, the performers are less likely to be subjected to physical contact with the spectators. The facility of police control of incidents that may arise in close quarters, non-uniform seating establishments with no fixed or distant stage as distinguished from open, uniform seating and fixed stage theaters and concert halls is obvious.

As the above discussion illustrates, the classification scheme

employed by the code sections prohibits only topless and bottomless exhibitions occurring in precisely defined circumstances, where the attendant police problems are the most acute and the communicative element of the regulated conduct is minimal. The terms of the legislation and the classification drawn, make clear that its basis and objective is not the regulation of obscenity or immorality, but solely that of regulating a particular method of merchandising which the legislative body found promoted criminal activity.

The City of Sacramento, exercising its police power has enacted the instant code sections and has drawn a classification to limit its applicability on the narrowest prossible basis consistent with achieving its legitimate and compelling governmental interest. It therefore does not improperly infringe upon petitioners' rights to the equal protection of the law.

IV

THE CODE SECTIONS' DISTINCTION BETWEEN THEATERS AND OTHER PUBLIC PLACES IS NOT UNCONSTITUTIONALLY VAGUE

Finally, petitioners assert that the code sections' use of the terms "theater" and "theatrical performances" render the sections fatally vague. The contention is without merit.

The question of vagueness is not properly before the Court. The matter was neither raised nor litigated in the California courts below. It may not be asserted for the first time on petition for certiorari (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 439).

In any event, the City Code sections in question are not vague. Section 26.60 defines the term theater in extensive and easily understood detail. The section provides:

> "As used in Sections 26.61 through 26.64 inclusive and in Sections 318.5 and 318.6 of the Penal Code the phrase 'theater, concert hall, or other similar establishment which is primarily devoted to theatrical performances' shall mean a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical or vaudeville performances or similar forms of artistic expression are presented, and where such performances are not incidental to the promoting of the sale of food, drink or other merchandise, and for which a city license for a theater is in full force and effect. This definition does not supersede the provisions of Sections 26.59 of this code."

Respondent submits that the detail in the Sacramento City Code section amply meets the constitutional requirement that an enactment not be phrased in ". . . terms so vague that men of

common intelligence must necessarily guess at its meaning and differ as to its application . . . " (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be denied.

EVELLE J. YOUNGER,
Attorney General

JACK R. WINKLER,
Chief Assistant Attorney General

A. WELLS PETERSEN,
Deputy Attorney General

DANIEL J. KREMER,
Deputy Attorney General

DANIEL J. KREMER
Deputy Attorney General

Attorneys for Respondent